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No. 93-1805

Supreme Court, U.S.
FILED
JUL 11 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

LAMBERT C. MIMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, to establish that petitioner violated the Hobbs Act, 18 U.S.C. 1951, the government had to prove that he received property or other tangible benefit from his extortionate conduct.

2. Whether the district court committed plain error in instructing the jury on the elements of a Hobbs Act violation.

3. Whether it was improper for the magistrate to seal the original indictment under Fed. R. Crim. P. 6(e)(4).

4. Whether the district court erred in admitting the diaries of a government witness into evidence.

5. Whether the district court abused its discretion when it denied petitioner's post-trial motion for a hearing on jury tampering and for permission to interrogate the jurors.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unpublished, but the judgment is noted at 12 F.3d 217 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1993. A petition for rehearing was denied on February 11, 1994. Pet. App. 7-9. The petition for a writ of certiorari was filed on May 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Alabama, petitioner was convicted of extorting property from another "under color of

official right" (Count 3) and conspiring to do so (Count 2), both in violation of the Hobbs Act, 18 U.S.C. 1951.[1] He was sentenced to two concurrent terms of ten years' imprisonment and fined $10,000. The court of appeals affirmed. Pet. App. 1-6.

1. Petitioner used his position as a City Commissioner of Mobile, Alabama, to induce Gerald Godwin to transfer part of his ownership interest in a company to Charles Shaw, petitioner's close friend and business associate.

In October 1980, Trash Burning Systems, Inc. (TBS), was formed to build and operate a plant in Mobile County, Alabama, that would generate steam by burning solid waste. Godwin was a stockholder and financial backer of TBS. TBS entered into a contract with Degussa Corporation under which Degussa agreed to buy the steam that would be generated by the proposed plant. Thereafter, two TBS owners met with petitioner, then one of Mobile's three City Commissioners, to gain his support for the project and the City's commitment to supply solid waste to the project. Petitioner told the TBS owners to contact Ellis McDonald about constructing the proposed steam-generating plant. McDonald owned several construction companies and had, in the past, done construction work for petitioner without billing him for it. Ultimately, petitioner refused to commit the City's solid waste to TBS, and, in January 1983, TBS was dissolved. Gov't C.A. Br. 13-15 & nn.7-8.

In October 1983, petitioner announced that the City would accept proposals for disposing of the City's solid waste. Godwin formed Area Services, Inc., which submitted a proposal to use the solid waste at a steam-generat-

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[1] Petitioner was acquitted of one substantive Hobbs Act charge (Count 4), and of conducting the affairs of an enterprise through a pattern of racketeering activity (Count 1).

ing plant and sell the steam to Degussa. Alabama Energy Recovery, Inc. (Alabama Energy) submitted a competing proposal to build a steam-generating plant at, and sell the steam to, the Stone Container Corporation. Alabama Energy was owned by Charles Shaw, a close personal friend and business associate of petitioner. Petitioner wanted Shaw to be the developer of the steam plant project, but an engineer told petitioner that it was not economically feasible to locate a steam plant at the Stone Container Corporation. Studies confirmed that Stone Container's energy usage and costs were too low to make Alabama Energy's proposed project economically feasible. Gov't C.A. Br. 15-16 & n.9, 19.

In late November 1983, Shaw, McDonald, and others met with Stone Container officials to tell them that the City had unofficially selected Shaw to head the steam-plant project and that McDonald would build the plant. It was also determined at that meeting, however, that the proposal submitted by Shaw's company (Alabama Energy) to sell all of the steam to Stone Container was not economically feasible. Gov't C.A. Br. 19-20.

In December 1983, Godwin went to McDonald's office, where McDonald introduced Godwin to Shaw. McDonald told the two men that, if any steam plant were built in Mobile, he was going to build it and Godwin and Shaw could own it. McDonald told Godwin and Shaw to work out the ownership arrangements between themselves. Shaw then took Godwin to Shaw's office and said that, if any steam plant were built in Mobile, he was going to own half of it. Shaw told Godwin that he should be satisfied to get "50% of something" rather than "100% of nothing." Godwin did not, however, agree during that meeting to give Shaw any interest in Godwin's company, Area Services. Gov't C.A. Br. 20.

In early January 1984, Godwin was again called to McDonald's office, where Shaw was waiting. Shaw demanded that Godwin cede 40% of Area Services to Shaw and 20% of it to an associate of Shaw's. This time, Godwin agreed. Gov't C.A. Br. 21-22.

On January 30, 1984, Godwin met Shaw and petitioner at a restaurant. At the meeting, petitioner asked Shaw if he had worked things out with Godwin, to which Shaw replied "yes." Petitioner told Shaw to send him a letter stating that Stone Container could not purchase the steam from the proposed project (as contemplated under Alabama Energy's proposal) and that the contract for the project should go to Area Services. Shaw did so. Two days later, petitioner told Godwin to send him a letter of intent to use McDonald's company to construct the plant. Godwin did so. On February 27, 1984, petitioner issued a press release stating that the City was giving the steam plant project to Area Services. Gov't C.A. Br. 22-23.

During 1984 and 1985, Godwin sought to arrange financing for the steam-plant project and to obtain commitments from the City and County of Mobile to supply solid waste to the project. The National Heritage Mortgage Corporation (NHMC) eventually took the lead from Godwin in arranging the financing. Shaw and McDonald made it clear to Godwin that, unless NHMC assured McDonald that his company would build the steam plant, neither the City nor the County would make commitments to supply their solid waste. Although the commitments were ultimately made, the steam plant was never built because a sharp fall in oil prices made it economically unfeasible. Gov't C.A. Br. 24-28 & n.18.

2. On December 1, 1988, a three-count indictment was returned against petitioner, McDonald, and Shaw in the Southern District of Alabama. Count 1 charged that, from October 1980 through October 1985, the three defendants

conspired to violate the Hobbs Act by (1) obtaining for Shaw an ownership interest in Area Services with Godwin's consent, which had been "induced by the wrongful use of threatened and actual fear, including the threatened and actual fear of economic and financial loss, and under color of official right"; and (2) attempting to obtain from NHMC the right to decide what company would build the proposed steam plant, by the use of threatened and actual fear of economic and financial loss, and under color of official right.[2] Count 2 charged that

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[2] Count 1 alleged:

> It was a part of the conspiracy that the defendants did obtain for [Shaw] certain property from Gerald Godwin, namely, a percentage of ownership in Area Services, Inc., with the consent of [Godwin], such consent being induced by the wrongful use of threatened and actual fear, including the threatened and actual fear of economic and financial loss, and under color of official right, in that the defendants, both subtly and overtly, by actions, inactions and statements, made [Godwin] understand that Area Services, Inc. would not receive the commitments from the City of Mobile necessary to make the construction and operation of a steam plant possible for Area Services, Inc. unless and until Gerald Godwin gave [Shaw] a percentage of ownership in Area Services, Inc.
>
> It was further a part of the conspiracy that the defendants attempted to obtain certain property of [NHMC], namely the right to make the business decision of what construction company [NHMC] would contract with to build the proposed steam plant free from outside pressure wrongfully imposed, with the consent of [NHMC], such consent being induced by the wrongful use of threatened and actual fear, including the threatened and actual fear of economic and financial loss, and under color of official right, in that the defendants threatened that both the county and the city officials would delay the signing of the contracts to supply the solid waste necessary for the fueling of the proposed steam plant unless [NHMC] assured [McDonald] that his company would construct the steam plant.

12/1/88 Indictment Count 1.

they violated the Hobbs Act from November 1983 to May 1, 1984, by using extortion to induce Godwin to cede partial ownership of Area Services to Shaw. Count 3 charged that they violated the Hobbs Act from September 26 to October 1, 1985, by the extortion involving NHMC. At the government's request, the magistrate sealed the indictment under Fed. R. Crim. P. 6(e)(4). Gov't C.A. Br. 4.

On June 30, 1989, a 35-count superseding indictment was returned. Count 1 of the indictment charged petitioner, McDonald, and one other person with conducting the affairs of an enterprise through a pattern of racketeering activity. The predicate racketeering acts charged against petitioner were the substantive Hobbs Act violations charged in the original indictment. Counts 2, 3, and 4 of the superseding indictment corresponded to Counts 1, 2, and 3 of the original indictment. Counts 5 through 35 charged defendants other than petitioner with offenses including mail fraud, obstruction of justice, income tax evasion, and the filing of false corporate tax returns. Gov't C.A. Br. 4-6.

3. Before trial, petitioner moved to dismiss the indictment. He argued that the statute of limitations on Count 3 of the superseding indictment (which was identical to Count 2 of the original indictment) had run while the original indictment was under seal and that he had been prejudiced by the delay in unsealing the indictment. In opposing the motion to dismiss, the government explained that the original indictment was returned on December 1, 1988, because the statute of limitations on one of the substantive Hobbs Act charges would otherwise expire within a few months. The government further explained that it had asked the magistrate to seal that indictment so that it could complete its investigation into tax and fraud offenses that had come to light after the investigation of the Hobbs Act violations was underway. The government

said that the investigation of the tax and fraud offenses was not completed, and the necessary departmental approvals to prosecute the racketeering and tax charges were not obtained, until June 30, 1989, when the superseding indictment was filed. Gov't C.A. Br. 9, 80-82; see also Defs. Mem. Br. in Support of Mot. to Dismiss on the Basis of Delay, etc., 1-3 [hereinafter "Mot. to Dismiss"]; Gov't Resp. to Mot. to Dismiss Exh. A.

After an evidentiary hearing, the district court denied the motion to dismiss the indictment. The court found that the indictment was sealed to allow the government to complete its investigation into tax fraud and tax charges relating to a racketeering prosecution, and the court held that that was a legitimate reason to seal the indictment. The court further found that petitioner failed to show that he had suffered "actual substantial and irreparable prejudice arising from the sealing of the indictment." 1/5/90 Order 1-4.

Petitioner and his co-defendants went to trial in January 1990, and the jury returned its verdict in April 1990. Petitioner was acquitted on the racketeering charge (Count 1) and the substantive Hobbs Act charge involving NHMC (Count 4). He was convicted on the Hobbs Act conspiracy charge (Count 2) and the substantive Hobbs Act charge involving Godwin (Count 3).

4. The court of appeals summarily affirmed petitioner's convictions, finding "no merit to any of the issues [petitioner] present[s] in this appeal." Pet. App. 4.

ARGUMENT

1. Petitioner contends (Pet. 18-26) that the government failed to prove a Hobbs Act violation because it failed to show that petitioner received property or some

other tangible benefit from Godwin or Shaw. Petitioner's understanding of the Act is incorrect.

The Hobbs Act proscribes "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). Despite petitioner's claim that "[t]his case takes the Hobbs Act where it has never gone before" (Pet. 19), it is well established that a person may violate the Hobbs Act without personally receiving the benefits of his or her extortionate conduct. See *United States* v. *Green*, 350 U.S. 415, 420 (1956) ("[E]xtortion as defined in the [Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property."); *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990) ("There is no requirement that the perpetrator of an extortion receive the benefit of his act."), cert. denied, 113 S. Ct. 66 (1992); *United States* v. *Carlock*, 806 F.2d 535, 553 (5th Cir. 1986) ("Hobbs Act prosecution may lie where the extorted payments are given to third parties"), cert. denied, 480 U.S. 949 (1987); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986) ("To secure a conviction under the Hobbs Act, the prosecution does not have to show that the defendant acted to receive, either directly or indirectly, the proceeds of his extortion or any benefit therefrom."), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Haimowitz*, 725 F.2d 1561, 1577 (11th Cir.), cert. denied, 469 U.S. 1072 (1984); *United States* v. *Margiotta*, 688 F.2d 108, 133 (2d Cir. 1982) ("A Hobbs Act prosecution may lie where the extorted payments are transferred to third parties, including political allies and political parties, rather than to the public official who has acted under color of official right."), cert. denied, 461 U.S. 913

(1983).[3] Thus, petitioner errs in contending that his extortionate conduct fell outside the Act merely because that conduct caused Godwin to transfer a portion of his company to Shaw, petitioner's close friend, rather than to petitioner himself.

Rejection of petitioner's contention does not mean that "every act of political patronage at every level of government and regardless of motivation" violates the Hobbs Act, as petitioner asserts (Pet. 25). To establish a violation of the Act, the government must prove that a politician has obtained a payment (or other benefit) to which he or she is not entitled, "knowing that the payment [or other benefit] was made in return for official acts." *Evans* v. *United States,* 112 S. Ct. 1881, 1889 (1992). The government made that showing here by proving that petitioner obtained for Shaw a portion of Godwin's company, knowing that Godwin was ceding an interest in his company to Shaw in order to obtain petitioner's approval of Godwin's steam-plant project.

2. Petitioner also contends (Pet. 27) that this case provides a "perfect opportunity" for the Court to decide an issue left open in *McCormick* v. *United States,* 500 U.S. 257, 274 n.10 (1991): whether proof of a "quid pro quo" is

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[3] Accord, *e.g., United States* v. *Cerilli,* 603 F.2d 415, 420 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Frazier,* 560 F.2d 884, 887 (8th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *United States* v. *Trotta,* 525 F.2d 1096, 1098 n.2 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); *United States* v. *Hyde,* 448 F.2d 815, 843 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); *United States* v. Jacobs, 451 F.2d 530 (5th Cir. 1971), cert. denied, 405 U.S. 955 (1972); *United States* v. *Tropiano,* 418 F.2d 1069, 1075-1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970); *United States* v. *Provenzano,* 334 F.2d 678, 686 (3d Cir.) ("it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom"), cert. denied, 379 U.S. 947 (1964).

necessary in every case in which an elected official is charged with violating the Hobbs Act by extorting property "under color of official right."[4] To the contrary, that issue is not properly presented in this case. Petitioner did not raise the "quid pro quo" issue in the district court or in his briefs to the court of appeals. Indeed, petitioner cited this Court's opinion in *McCormick* for the first time in his petition for rehearing in the court of appeals, even though, as he concedes (Pet. 30 n.9), the *McCormick* opinion was issued before the court of appeals in this case heard oral argument. Moreover, petitioner did not cite *McCormick* in his rehearing petition for the proposition that the government's theory of prosecution was legally insufficient for failure to allege a "quid pro quo," or that the district court improperly failed to instruct the jury that it had to find a "quid pro quo" to convict him. Instead, petitioner argued that the evidence failed to show that he was "in cahoots" with Shaw or McDonald. Pet. C.A. Reh'g Pet. 10. Under those circumstances, petitioner may not raise the "quid pro quo" issue in this Court, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), and the district

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[4] In *McCormick*, the Court addressed "the issue of what proof is necessary to show that the receipt of a campaign contribution by an elected official is violative of the Hobbs Act," 500 U.S. at 267 n.5, when it is charged that the official obtained the contribution "under color of official right," *id.* at 266. The Court held that "[t]he receipt of such contributions is * * * vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *Id.* at 273. The Court declined to "decide whether a *quid pro quo* requirement exists in other contexts [not involving campaign contributions], such as when an elected official receives gifts, meals, travel expenses, or other items of value." *Id.* at 274 n.10; see also *id.* at 268-269.

court's jury instructions on the Hobbs Act charges are reviewable only for plain error, see *McCormick*, 500 U.S. at 268 n.6; see generally *United States* v. *Olano*, 113 S. Ct. 1770 (1993) (discussing plain error rule).

The district court did not commit plain error in instructing the jury on the Hobbs Act charges. Because this case did not involve campaign contributions, cf. *McCormick*, *supra*, the government was required under *Evans* v. *United States*, to show only that petitioner "obtained a [benefit] to which he was not entitled, knowing that the [benefit] was made in return for official acts." 112 S. Ct. at 1889. The jury instructions in this case were consistent with *Evans*. The jury was instructed:

> Extortion under color of official right is the wrongful taking by a public officer of money or property not due him or his office * * *. The wrongful use of otherwise valid official power may convert a lawful action into unlawful extortion. So, if a public official misuses his office by threatening to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion even though the official was already duty bound to take or withhold the action in question.

Under that instruction, the jury had to find that petitioner "obtained a [benefit] to which he was not entitled"—*i.e.*, Godwin's transfer to Shaw of an interest in Area Services—"knowing that the [benefit] was made in return for [an] official act[ ]"—*i.e.*, petitioner's approval of Godwin's steam-plant project. *Evans*, 112 S. Ct. at 1889.[5]

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[5] As petitioner observes (Pet. 17), the Eleventh Circuit stated in *United States* v. *Martinez*, 14 F.3d 543, 553 (1994), that *Evans* "adopt[ed] the *quid pro quo* requirement of *McCormick*" for all "official right" cases, and held that jury instructions similar to those given

3. Petitioner next contends (Pet. 31-48) that an indictment may not be sealed in order to toll the statute of limitations and that the government was required to justify the sealing of an indictment when it asked the magistrate to seal it. Every court of appeals that has considered those contentions has rejected them.

Under Fed. R. Crim. P. 6(e)(4), the government may ask that an indictment be sealed for a period that extends beyond the time when the statute of limitations on charges in the indictment would otherwise have run.[6] A magistrate has discretion to grant such a request "for any legitimate prosecutorial objective or where the public interest otherwise requires it." *United States* v. *Richard*, 943 F.2d 115, 118 (1st Cir. 1991). Accord *United States* v. *Sharpe*, 995 F.2d 49, 52 (5th Cir. 1993); *United States* v. *Ramey*, 791 F.2d 317, 320-321 (4th Cir. 1986); *United States* v. *Mitchell*, 769 F.2d 1544 (11th Cir. 1985), cert. denied, 474 U.S. 1066 (1986); *United States* v. *Southland Corp.*, 760 F.2d 1366, 1379-1380 (2d Cir.), cert. denied, 474 U.S. 825 (1985). The sealing of an indictment tolls the statute of

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here were inadequate to convey that requirement. Any tension between the Eleventh Circuit's unpublished decision in this case and its later decision in *Martinez* is for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Moreover, petitioner, unlike the defendant in *Martinez*, did not object in the courts below to the district court's jury instruction on the ground that it failed to require the jury to find a "quid pro quo," and therefore the issue of whether such a requirement exists is not properly presented here.

[6] Rule 6(e)(4) provides:

> The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

limitations. See, *e.g.*, *United States* v. *Sharpe*, 995 F.2d at 51 & n.3 (collecting cases). When the indictment remains sealed beyond the limitations period, the defendant is entitled to dismissal of the indictment only if he or she can show that the delay caused actual, substantial, and irreparable damage. *United States* v. *Sharpe*, 995 F.2d at 51; *United States* v. *Srulowitz*, 819 F.2d 37, 40 (2d Cir.), cert. denied, 484 U.S. 853 (1987); *United States* v. *Edwards*, 777 F.2d 644, 649 (11th Cir. 1985), cert. denied, 475 U.S. 1123 (1986); *United States* v. *Mitchell*, 769 F.2d at 1547; *United States* v. *Muse*, 633 F.2d 1041, 1043 (2d Cir. 1980), cert. denied, 450 U.S. 984 (1981). Under those principles, the sealing of the original indictment against petitioner was proper.

First, the government had a legitimate reason for requesting a sealed indictment. As the government explained at the hearing on petitioner's motion to dismiss the indictment, and as the district court found, the government asked for the sealing of the indictment to permit it to complete its investigation. During the investigation, the government discovered evidence implicating McDonald and others in additional fraud and tax offenses. The government needed to investigate further to decide whether to bring a racketeering prosecution based on the Hobbs Act, tax, and fraud violations. That was plainly a legitimate prosecutorial objective justifying the sealing of the indictment. *United States* v. *Lakin*, 875 F.2d 168, 170-171 (8th Cir. 1989) (need for more time to gather additional evidence to determine whether the case should be pursued is a legitimate prosecutorial objective justifying the sealing of the indictment).

Contrary to petitioner's assertion (Pet. 31-43), the government was not required to explain, before the indictment was unsealed, why it had asked the magistrate to seal

the indictment. Nothing in the text of Fed. R. Crim. P. 6(e)(4) imposes such a requirement. Instead, "it is wholly within the discretion of the Magistrate whether to require the prosecutor to justify a request to seal" when the request is made. *United States* v. *Srulowitz*, 819 F.2d at 41; see also *United States* v. *Sharpe*, 995 F.2d at 52. A magistrate can reasonably decide not to require a justification by the government before the indictment is unsealed, because such a requirement could cause the very disclosure that the sealing is meant to prevent. *United States* v. *Sharpe*, 995 F.2d at 52; *United States* v. *Lakin*, 875 F.2d at 171-172. The courts have recognized that a defendant's interests may be adequately protected by allowing the defendant to challenge the sealing of an indictment, and requiring the government to justify it, after the indictment is unsealed. *United States* v. *Sharpe*, 995 F.2d at 52; *United States* v. *Lakin*, 875 F.2d at 171; *United States* v. *Srulowitz*, 819 F.2d at 40-41. Petitioner has not shown that that procedure was inadequate in this case.

Nor does petitioner provide any basis for further review of the district court's finding that the sealing of the indictment did not cause him "actual substantial and irreparable prejudice." 1/5/90 Order 4. Petitioner has asserted that a "critical" witness, Gurney Owens, suffered a stroke and became unavailable after the original indictment was filed and before the superseding indictment was returned. See Pet. 37-38. Petitioner never made any showing or proffer, however, of what Owens' testimony would have been or how it would have aided his defense. Instead, he merely asserts that he "expected" Owens "to provide exculpatory testimony." Pet. 37; see Pet. C.A. Br. 28-29. That vague assertion is plainly inadequate to establish actual prejudice, especially when in interviews with investigating agents and his grand jury testimony, Owens inculpated petitioner in the crimes charged. Gov't C.A. Br. 83.

4. Petitioner contends (Pet. 58-61) that the district court erred in admitting Godwin's diaries into evidence under Fed. R. Evid. 801(d)(1)(B) to rebut a claim of recent fabrication. That contention does not merit further review.

a. The evidence at trial showed that during 1984 Godwin kept contemporaneous notes of his daily activities on scraps of paper or a desk diary and later transferred the notes to a legal pad for use as a permanent diary. The scraps of paper and the desk diary were marked GEX 27. Godwin gave the government a photocopy of the permanent diary, which was marked GEX 27A. Before trial, defense counsel asked for the original of GEX 27A to test it for authenticity. The government was unable to supply the original, because Godwin claimed he had lost it during a move. The government did, however, give defense counsel the original scraps of paper and desk diary that were GEX 27. Gov't C.A. Br. 117-118.

During direct testimony, Godwin used the diaries to refresh his recollection, often reading directly from them. During cross-examination, defense counsel asked him what had happened to the original of GEX 27A. Defense counsel said that he wanted to test its authenticity, suggesting that it had been fabricated. The government offered GEX 27 into evidence to rebut that charge of recent fabrication. Gov't C.A. Br. 119-120.

During his testimony, petitioner admitted that he had used Godwin's diaries to refresh his recollection in preparation for his trial testimony. Gov't C.A. Br. 118-121.

The district court admitted GEX 27 and GEX 27A into evidence after excising the portions of those exhibits about which there had been no testimony. The court determined that defense counsel had raised a claim that Godwin's testimony and the diaries had been fabricated. The court

also determined that, because of the exhaustive cross-examination on the diaries, no prejudice would result from their admission. The court noted that petitioner had used the diaries to refresh his own recollection. Gov't C.A. Br. 121.

b. The district court acted well within its discretion in admitting into evidence those portions of the diaries as to which there had been testimony. When the diaries were admitted, defense counsel had already extensively cross-examined Godwin about them; thus, their contents had been brought to the jury's attention by petitioner and his co-defendants. Admission of the diaries themselves added nothing new and did not prejudice petitioner. Moreover, because petitioner used the diaries to refresh his own trial testimony, the diaries were admissible under Fed. R. Evid. 612. That Rule provides that if a witness uses a writing to refresh his or her memory for the purpose of testifying, an adverse party is entitled to have introduced into evidence those portions that relate to the witness's testimony.[7]

5. Petitioner further contends (Pet. 48-58) that the district court erred in denying his post-trial motion to interview the jurors and for a hearing on possible jury tampering. That fact-bound contention is without merit.

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[7] This Court need not hold the petition in this case pending disposition of *Tome* v. *United States*, cert. granted, 114 S. Ct. 1048 (1994) (No. 93-6892), as petitioner urges (Pet. 61). *Tome* presents the question whether prior consistent statements offered to rebut a charge of improper influence or motive may be admitted under Fed. R. Evid. 801(d)(1)(B) without a showing that the statements were made before the influence or motive arose. Although petitioner seeks review of a similar issue—by arguing that Godwin's diaries were not admissible under Rule 801(d)(1)(B) because they were prepared after Godwin's motive to fabricate them arose—resolution of that issue would not affect the outcome of this case. As discussed in the text, even if the diaries were not admissible under Rule 801(d)(1)(B), they were admissible under Rule 612, and even if their admission was error, the error was harmless because it caused no prejudice to petitioner.

a. During the trial, juror Clyde Byrd told the court that someone offered him a bribe to influence his verdict and that he had related the incident to juror Mike Etheridge. Byrd assured the court that no one had overheard him tell Etheridge. Although both Byrd and Etheridge told the court that they could put the incident aside, the court excused them from the jury. The court then instructed the remaining jurors that they need not concern themselves about why Byrd and Etheridge had been excused. Gov't C.A. Br. 187-188; 2/5/91 Order 1-6.

At the government's request, the court interviewed the remaining jurors in camera later the same day. The court asked them whether they knew why Etheridge and Byrd had been excused and whether they had overheard the two men's conversation that morning. All of the jurors except one Harper answered no to both questions. Harper said that she did not know why Byrd and Etheridge had been excused but she overheard Etheridge say, "If he didn't have something to hide, he would have revealed it." Harper said that after hearing that remark she moved to the other side of the room. She assured the court that the incident would not affect her deliberations. Harper, who was an alternate juror, did not deliberate. Gov't C.A. Br. 188; 2/5/91 Order 6-7.

At the end of the trial, the court asked the jurors in camera whether they knew of any attempted influence on any of the jurors by any outside source and whether they had been exposed to any publicity about the case. All of them answered no to both questions. Gov't C.A. Br. 188-189.

After trial, petitioner and his co-defendants moved for permission to interview the jurors and for a hearing on whether their right to a fair trial had been affected by jury tampering. In support of the motion, the defendants filed

two affidavits: one by an investigator hired by the lawyer representing McDonald on an obstruction of justice charge stemming from the attempted bribe of juror Byrd; and one by the lawyer who represented McDonald at the trial in this case. The investigator said that he interviewed Etheridge after he was excused from the jury; Etheridge said that, while juror Byrd was being interviewed by the court, other jurors had asked him what was going on, to which Etheridge had replied he knew but could not tell. The investigator further alleged that Etheridge claimed he had telephoned a juror to find out who had been elected foreman, but that the juror told him she was too busy to talk then and never returned his call. McDonald's trial attorney said in his affidavit that after the incident involving Byrd and Etheridge the remaining jurors no longer seemed "friendly and receptive," and that, in his opinion, "this jury knew something was wrong." The district court denied the motion, finding no evidence of prejudice to the defendants from the attempted bribe of Byrd or from Etheridge's attempt to contact a juror after his dismissal. Gov't C.A. Br. 189-190; 2/5/91 Order 10-16.

b. A district court has broad discretion in responding to a claim of jury tampering. The court need not investigate the claim at all if it is insubstantial. *United States* v. *Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992), cert. denied, 113 S. Ct. 2448 (1993); *United States* v. *Jerome*, 942 F.2d 1328, 1332 (9th Cir. 1991) (post-trial affidavit submitted by defendant showed no extraneous influences upon affiant juror's decision to warrant evidentiary hearing); *United States* v. *Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991); *United States* v. *Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir.), cert. denied, 484 U.S. 969 (1987). When the claim is substantial, the court has wide latitude in deciding how to investigate it. *United States* v. *LaSpesa*, 956 F.2d 1027, 1033 (11th Cir. 1992) ("the district court

has broad discretion to choose the inquisitorial tools . . . necessary and appropriate to determine prejudice where juror misconduct or extrinsic influences are alleged") (internal quotation marks omitted); see *United States* v. *Ruggiero,* 928 F.2d 1289, 1301 (2d Cir.), cert. denied, 112 S. Ct. 372 (1991); *United States* v. *Pallais,* 921 F.2d 684, 686 (7th Cir. 1990), cert. denied, 112 S. Ct. 134 (1991); *United States* v. *Chang An-Lo,* 851 F.2d 547, 558 (2d Cir.), cert. denied, 488 U.S. 966 (1988); *United States* v. *Phillips,* 664 F.2d 971, 998-1000 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982).

The district court acted reasonably in responding to the jury-tampering incident in this case. When the court learned that Byrd had been offered a bribe and had told Etheridge about it, the court excused them from the jury. The court then questioned the remaining jurors to ensure, as Byrd had asserted, that none of them had learned of the bribe attempt. The court questioned the jurors again at the end of the trial to make sure that they had not been subjected to any extrinsic influence.

Nothing in the post-trial affidavits filed by petitioner and his co-defendants warranted additional inquiry. The affidavit of the investigator indicated that some jurors asked Etheridge why Byrd was being interviewed by the court and that Etheridge did not tell them. The affidavit thus suggested that the jury did not know that someone had attempted to bribe Byrd, and it confirmed that they did not find out about the bribe attempt from Etheridge. The investigator's affidavit also related that Etheridge telephoned one of the jurors to find out who had been elected foreman. It is not clear from the affidavit whether the telephone call occurred while the jury was deliberating or after it had returned its verdict. In any event, it is clear that the telephone call did not result in any prejudicial contact, since the juror told Etheridge that she was too

busy to talk and did not call him back. Finally, the affidavit of McDonald's trial attorney offered only his impression that the remaining jurors were no longer "friendly and receptive" after Byrd and Etheridge were excused and his speculation that they "knew something was wrong." The district court did not abuse its discretion in declining to investigate further.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1994

U.S. GOVERNMENT PRINTING OFFICE: 1994—301-157/86172